U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0365

RICHARD McNISH	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
EAGLE MARINE SERVICES, LIMITED	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	DATE ISSUED: Feb. 24, 2016
	)	
SSA MARINE TERMINALS	)	
	)	
and	)	
	)	
HOMEPORT INSURANCE COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Designating Responsible Employer and Approving Settlement of William J. King, Administrative Law Judge, United States Department of Labor.

Raymond H. Warns, Jr. (Holmes Weddle & Barcott, P.C.), Seattle, Washington, for Eagle Marine Services, Ltd.

Mark K. Conley (Bauer Moynihan & Johnson, LLP), Seattle, Washington, for SSA Marine Terminals and Homeport Insurance Company.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Eagle Marine Services, Limited (EMS) appeals the Decision and Order Designating Responsible Employer and Approving Settlement (2014-LHC-01678) of Administrative Law Judge William J. King rendered on a claim filed pursuant to the

provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant began working as a longshoreman in 1994. JX 11 at 13. After an October 9, 2013 audiogram showed a binaural hearing impairment of 15.9 percent, JX 9, claimant filed a claim for benefits under the Act, alleging that his hearing loss was work-related. Claimant underwent a second audiogram on December 19, 2013, which showed a binaural hearing loss of 9.06 percent. JX 2. Claimant last worked as a frontman/slingman for EMS prior to the October audiogram and for SSA Marine Terminals (SSA) prior to the December audiogram. JX 9 at 35; EMS trial brief EX 3. Claimant testified that his work as a frontman/slingman for both employers exposed him to injurious noise from cranes, semi-trucks, and forklifts. JX 11 at 16-17, 28-30, 62.

Prior to the scheduled hearing in this case, the parties agreed to a Section 8(i), 33 U.S.C. §908(i), settlement with the proceeds to be paid to claimant by the responsible employer.[1] The only issues presented to the administrative law judge were that of the responsible employer and approval of the Section 8(i) settlement agreement. The administrative law judge found that both the October and December audiograms were "presumptive" evidence of claimant's hearing loss as they met the requirements of 33 U.S.C. §908(c)(13)(C) and 20 C.F.R. §702.441(b)(1)-(3).[2] Decision and Order at 3. Although Dr. Randolph opined that the results of the December test are more accurate because it showed a lesser degree of hearing loss, the administrative law judge found this

[1] Under the terms of the parties' agreement and stipulations, EMS agreed to: 1) pay claimant $24,652.25 in permanent partial disability benefits, based on the averaged results of the two audiograms; 2) provide claimant with an initial set of hearing aids; and, 3) pay claimant's attorney's fees. SSA agreed to reimburse EMS for the amounts advanced to claimant for compensation, medical benefits, and attorney's fees if it was found to be the responsible employer. Joint Stipulations (May 26, 2105).

[2] While the December audiogram also met the criterion at 20 C.F.R. §702.441(d) regarding the calibration of the audiometer, the administrative law judge noted there is no evidence addressing the calibration of the audiometer used for the October audiogram. The administrative law judge nonetheless found the October audiogram "determinative" of the degree of claimant's hearing loss because it was administered and interpreted by Dr. Langman (JX 3), an expert in otolaryngology, Dr. Randolph offered no criticisms of the test or its results (JX 12), and there was no evidence that its results were flawed. Decision and Order at 3-4.

aspect of Dr. Randolph's opinion unpersuasive; the administrative law judge found the basis for Dr. Randolph's opinion was merely that he was aware of the qualifications of the audiologist and the testing facility. The administrative law judge, therefore, found neither test to be more determinative of claimant's occupational hearing loss than the other. Decision and Order at 6. As the October test marked the onset of claimant's compensable disability, and as EMS was the last employer to expose claimant to injurious noise prior to the October audiogram, the administrative law judge found EMS to be the employer liable for claimant's benefits. *Id*. Finding that the proposed settlement agreement was not inadequate or procured by duress, the administrative law judge approved the Section 8(i) settlement agreement.

On appeal, EMS challenges only the administrative law judge's finding that it is the responsible employer. SSA responds, urging affirmance. EMS filed a reply brief in support of its position.

The responsible employer in a hearing loss case is the last employer to expose claimant to injurious stimuli prior to the administration of the audiogram determinative of claimant's disability. *See Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137(CRT) (9th Cir. 1991); *see also Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955). The "determinative audiogram" is the one that establishes the amount of compensation benefits. *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 962, 31 BRBS 206, 212(CRT) (9th Cir. 1998); *Port of Portland*, 932 F.2d 836, 24 BRBS 137(CRT); *see also Mauk v. Northwest Marine Iron Works*, 25 BRBS 118 (1991). There must be a "rational connection" between the onset of the employee's disability and his exposure to injurious stimuli with a particular employer. *Port of Portland*, 932 F.2d at 840-841, 24 BRBS at 143-145(CRT); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Thus, the responsible employer is the last employer covered under the Act who, by exposing the claimant to injurious noise, could have contributed causally to the disability evidenced on the determinative audiogram. *Jones Stevedoring Co. v. Director, OWCP [Taylor]*, 133 F.3d 683, 31 BRBS 178(CRT) (9th Cir. 1997).

EMS asserts the administrative law judge erred in finding the October audiogram to be determinative of claimant's hearing loss in light of Dr. Randolph's uncontradicted testimony that the December audiogram is more accurate than the October audiogram because it shows the lesser amount of hearing loss.[3] EX 12 at 29-32. We reject EMS's

[3] Dr. Randolph explained that an audiogram's reported binaural hearing loss rating represents overall hearing loss; it includes all factors that have an effect on hearing, not just noise exposure. JX 12 at 32. He opined that the test that shows "the best numbers" better represents a person's hearing capacity because there are many factors unrelated to industrial noise exposure that can cause variation from test to test. *Id*. at 30-31. As the

contention. The administrative law judge found Dr. Randolph's opinion on this matter unpersuasive because the factors Dr. Randolph identified as potentially causing variation were variables over which the tester has no control[4] and because, when questioned about the basis for his opinion, Dr. Randolph stated only, "It's because I know who did the testing and I know the facility [claimant] was tested in and I know it's a reliable test." [5] Decision and Order at 4; JX 12 at 30, 55.

Contrary to EMS's assertion, the administrative law judge rationally declined to credit Dr. Randolph's subjective opinion as to the relative reliability of the otherwise valid audiograms. *Rhine v. Stevedoring Services Of America*, 596 F.3d 1161, 44 BRBS 9(CRT) (9th Cir. 2010); *Cordero*, 580 F.2d 1331, 8 BRBS 744. Absent any credible evidence that either test better measured claimant's compensable hearing loss, it was reasonable for the administrative law judge to find that neither of the valid audiograms

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December test showed the least amount of hearing loss, Dr. Randolph opined that indicated claimant was having a good/better day in terms of factors unrelated to noise exposure. *Id*. at 31-32.

[4] Dr. Randolph's testimony as to the many factors that could cause variations in valid test results was as follows:

> You've got the tester. You know, are they in a hurry today, are they feeling well. You've got the testee. Did he ride a motorcycle in to get his test done. That has a temporary shift in his hearing. Are the ears blocked up that day. Does he have a cold. These are things that cause variations. The list goes on and on and on.

JX 12 at 30. Dr. Randolph additionally observed that claimant had a fluctuating sensorineural hearing loss in lower frequencies, which is atypical of noise-induced hearing loss, but is consistent with some diseases, such as endolymphatic hydrops. *Id*. at 30-31.

[5] EMS's assertion that Dr. Randolph attributed the variation between claimant's October and December audiograms to endolymphatic hydrops is not supported by the record. Although Dr. Randolph indicated that this medical condition was one of many factors that could explain claimant's fluctuating sensorineural hearing loss at lower frequencies, Dr. Randolph testified that he mentioned this condition only as "a potential possibility," and that he did not diagnose claimant with this condition. EX 12 at 41. Dr. Randolph "could not state that [claimant] has this condition on a more probable than not basis," and he conceded that no medical doctor has diagnosed claimant with this condition. *Id*. at 41-42.

was more determinative than the other. *See G. K. [Kunihiro] v. Matson Terminals, Inc.*, 42 BRBS 15 (2008), *aff'd mem. sub nom. Director, OWCP v. Matson Terminals, Inc.*, 442 F.App'x 304 (9th Cir. 2011) (for purposes of Section 8(f), administrative law judge can find two audiograms demonstrate the same hearing loss based on test/retest variability); *Roberts v. Alabama Dry Dock & Shipbuilding Corp.*, 30 BRBS 229 (1997). Further, the administrative law judge rationally found that the October audiogram marked the onset of claimant's disability as it was the first to measure the loss that formed the basis of claimant's claim. *Roberts*, 30 BRBS at 232;[6] *see generally Green-Brown v. Sealand Services, Inc.*, 586 F.3d 299, 43 BRBS 57(CRT) (4th Cir. 2009). Therefore, as EMS was the last employer to expose claimant to injurious noise prior to the onset of claimant's disability as demonstrated by a determinative audiogram, we affirm the administrative law judge's finding that EMS is the responsible employer as it is rational, supported by substantial evidence, and in accordance with law. *Port of Portland*, 932 F.2d at 840-841, 24 BRBS at 143-145(CRT); *Cordero*, 580 F.2d 1331, 8 BRBS 744; *Roberts*, 30 BRBS at 232.

[6] Similar to the facts of this case, the claimant in *Roberts* underwent two audiograms, the earlier one of which demonstrated a greater disability than the latter, and the administrative law judge found both audiograms to be determinative. Citing *Port of Portland*, 932 F.2d at 840-841, 24 BRBS at 143-145(CRT), and *Cordero*, 580 F.2d 1331, 8 BRBS 744, the Board held that the carrier on the risk prior to the onset of disability, that is prior to the first audiogram, was the liable party, as the results of this audiogram were higher than the results of the later one, and thus, the later exposure could not have contributed causally, even theoretically, to the compensable hearing loss. *Roberts*, 30 BRBS at 232. Contrary to EMS's assertion, the administrative law judge in this case, as in *Roberts*, assigned liability based on the presence of a rational connection between claimant's exposure to injurious noise and the onset of his disability, and not based on the date that claimant became aware of his work-related hearing loss. *See Good v. Ingalls Shipbuilding, Inc.*, 26 BRBS 159 (1992) (overruling prior law that "awareness" is relevant to determining the responsible employer).

Accordingly, the administrative law judge's Decision and Order Designating Responsible Employer and Approving Settlement is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge